Supreme Court of the United States

October Term, 1947

No. 158

ISABEL KAY, BERTHA BUTMAN and BERTHA BUTMAN, as Executrix under the Will of JULIA KAY,

Petitioners,

v.

EMILY W. MACCORMACK, EDITH M. MACCORMACK, and ROBERT S. MACCORMACK, JR., as Executors and Trustees under the Will of ROBERT S. MACCORMACK, deceased, and MARIE HEGEMAN WARNOCK, individually and as surviving executrix of the Estate of HENRY B. HEGEMAN, deceased, and MAX R. HOENER, substitute-successor executor under the Will of GEORGE L. BUCKMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Isabel Kay, Bertha Butman, and Bertha Butman, as Executrix under the Will of Julia Kay, petitioners, respectfully pray that a writ of certiorari issue to the Surrogate's Court of the County of New York, State of New York, to review the final judgment of the New York Court

of Appeals of April 10, 1947 (R. 37), in a case entitled *Matter of George L. Buckman, deceased; Kay, et al., appellants* v. *MacCormack, et al., respondents.*

Opinions Below

The Court of Appeals wrote no opinion, but its order is at R. 37, and is reported at 296 N. Y. 915, 73 N. E. (2d) 37. The opinion of the Supreme Court, Appellate Division, appears at R. 30, 34, and is reported at 270 App. Div. 707, 62 N. Y. S. (2d) 337. The opinion of the Surrogate's Court appears at R. 25, and is reported at 183 Misc. 1, 50 N. Y. S. (2d) 201.

Statutes Involved

The following statutes of New York are involved: §124 of the Decedent Estate Law, §§249-m and 249-r of the Tax Law, and §56 of the Surrogate's Court Act. Pertinent portions of these statutes are set forth in the Appendix to this petition, *infra,* pages 17-20.

Statement of Matter Involved

The New York Court of Appeals has held here that the due process clause of the Fourteenth Amendment to the United States Constitution prevented the acquisition in this proceeding of personal jurisdiction over the respondents (other than respondent Hoener*) (R. 38). It is

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* Respondent Hoener is the substitute-successor executor under the Will of George L. Buckman, the decedent herein, and is a nominal party on this petition for certiorari. The term "respondents", unless otherwise stated, hereafter refers to the respondents other than respondent Hoener.

petitioner's contention that, conformably to the Fourteenth Amendment as construed in *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), such jurisdiction exists.

George L. Buckman died on June 1, 1942, a resident of New York (R. 13). The purpose of this proceeding in the administration of his estate is to determine which persons interested in the estate are to share the burden of the estate taxes heretofore paid by the estate representative (R. 13-17).

For purposes of the Federal tax, the gross taxable estate included a portion of certain gifts made by the decedent *inter vivos.** These were taxed under a compromise agreement between the executor and the government, on the latter's contention that these gifts had been made in contemplation of death (R. 8-9).

Certain gifts to Robert S. MacCormack and Henry B. Hegeman were among those thus included, in part, in the gross estate (R. 9). Both of these donees, while residents of New Jersey, predeceased the decedent, George L. Buckman (R. 15-16). The respondents herein are the New Jersey executors and trustees of these donees (R. 15-16), and have no other interest in the estate, as such executors or otherwise. The issue is whether they may be brought into this proceeding on constructive service of process.

Section 124 of the New York Decedent Estate Law, Appendix, *infra,* page 17, provides that, except as otherwise directed in a testator's will, the burden of federal and state estate taxes paid by the executor shall be equitably

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* While we believe it immaterial to the point at issue, the fact is that the donor was a resident of New York at the time these gifts were made, the Record, however, being silent on this point.

prorated among the persons interested in the estate, generally in proportion to the value of the interest received by each such person. Persons interested in the estate are defined by this section and by §§249-m and 249-r of the Tax Law, Appendix, *infra,* pages 19, 20, as including donees of *inter vivos* gifts which have been included in the taxable estate of the decedent. Under §124, the Surrogate may order persons interested in property included in the taxed estate, but which does not come into the hands of the executor, to pay their share of the taxes to the executor.

The proceeding in the present case was initiated by a petition for an accounting, filed in the Surrogate's Court by the executor (R. 4). The executor proposed that the entire estate tax be allocated against the residuary legatees, the petitioners herein (R. 9). Petitioners, however, filed objections to this proposed allocation (R. 11), claiming that the tax should be apportioned among those interested in the estate, in accordance with the provisions of §124 of the Decedent Estate Law. After a hearing, the Surrogate's Court found that the presence of the donees of the *inter vivos* gifts was "essential to a final determination of the rights of the parties" (R. 13) and accordingly directed that they be brought before the Court (R. 13-14).

The executors then filed a supplemental petition, and a supplemental citation was issued to respondents, among others (R. 13-18). This citation, pursuant to §56 of the Surrogate's Court Act, Appendix, *infra,* page 20, was served on the respondents (who, as said above, are not residents of New York) by publication and by mailing copies of the citations to them (R. 19-21). By the terms of the citation, the respondents were, among other things,

cited to show cause why the amount of their liability, if any, in respect of the allocation and proration of taxes under §124 should not be adjudicated (R. 18).

Each of the respondents appeared specially for the purpose of objecting to the jurisdiction of the Court and filed answers objecting to such jurisdiction. Respondents contended that the Court did not have personal jurisdiction over them, since they were non-residents who had no interest in the property which was being administered by the Court and who had not been personally served with process within the State of New York (R. 21-24).

The Surrogate's Court overruled this challenge to the jurisdiction of the Court (R. 3-4, 25). Upon appeal by respondents from this order, the Supreme Court, Appellate Division, one Justice dissenting, reversed, sustaining the challenge to the jurisdiction of the Surrogate's Court and dismissing the proceeding as to respondents (R. 29-35). The Court of Appeals affirmed (R. 37-39), holding, as will be seen in our discussion of Jurisdiction, *infra*, that the due process clause of the Fourteenth Amendment prevented acquisition of personal jurisdiction of the respondents.

On remand, the Surrogate's Court entered its order in conformity to the remittitur of the Court of Appeals (R. 40).

Jurisdiction

The jurisdiction of this Court is invoked under §237(b) of the Judicial Code, as amended, 28 U. S. C. §344(b).

The Court of Appeals in this case necessarily decided a question under the United States Constitution, as is certi-

fied in the following portion of its amended remittitur (R. 38-39):

> "Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellants argued that for the purpose of enabling the Surrogate's Court to make a complete and effective determination as to the allocation of Federal and State estate taxes, Section 124 of the Decedent Estate Law and Section 56 of the Surrogate's Court Act authorized the acquisition of personal jurisdiction over respondents (other than respondent Hoener) upon constructive service of process and as so construed were consistent with the due process clause of the 14th Amendment to the Federal Constitution. This Court held that the aforesaid statutes if so construed would be repugnant to that provision of the Federal Constitution and construed the statutes as not authorizing such acquisition of personal jurisdiction."

The Court of Appeals construed the statutes here involved as not authorizing the acquisition of personal jurisdiction. The Court's decision, however, since it "necessarily passed upon a question under the Constitution of the United States" clearly was based solely on the ground that a contrary construction would be repugnant to the Federal Constitution. The judgment, therefore, does not rest "upon an independent interpretation of the state law". *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, 514 (1939).

Question Presented

Does the due process clause of the Fourteenth Amendment to the United States Constitution prevent a State surrogate's court from acquiring personal jurisdiction of

non-residents upon constructive service of process in a proceeding for the apportionment of estate taxes, where those non-residents are donees of gifts made in contemplation of death and those gifts have been included in the gross taxable estate of the donor who died a resident of that State, and where a complete and effective determination of the issues in the proceeding requires the presence of the non-residents?

Reasons Relied on for Allowance of Writ

1. The New York Court of Appeals decided a federal question of substance, either not in accordance with the decisions of this Court or not yet decided by this Court.

Respondents, relying on *Pennoyer* v. *Neff*, 95 U. S. 714 (1877), have argued successfully in the New York courts that it is not consistent with due process for them, non-residents, to be subjected to the jurisdiction of the New York courts on the constructive service of process here utilized. They have argued that under *Pennoyer* v. *Neff* personal service upon them within New York is required.*

We believe that the New York courts have applied the rule of *Pennoyer* v. *Neff*, too broadly. The lower courts have failed to recognize that non-residents have no immunity from service by constructive process, where, as here, they have sufficient contacts with the State in which suit is brought to give that State power to create the ob-

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* There has been no contention that the process here, publication and service by mail, was not "reasonably calculated to give [respondents] actual notice of the proceedings and an opportunity to be heard." *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940). In fact "actual notice" is conceded.

ligation asserted, and where, as here, there are practical reasons why they should be required to answer in that State.

This limitation on *Pennoyer* v. *Neff* was expressed by this Court in *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), at page 316:

> "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer* v. *Neff,* 95 U. S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

The decisions of this Court illustrate the kinds of contacts which permit the acquisition of jurisdiction over such absent defendants on constructive service of process. Thus, a non-resident motorist may be sued on constructive service upon causes of action arising out of his use of the highways of the State. *Hess* v. *Pawloski,* 274 U. S. 352 (1927). An absent defendant, domiciled within a State, may, consistently with due process, be brought within the jurisdiction of its courts by substituted service. *Milliken* v. *Meyer,* 311 U. S. 457 (1940). A non-resident individual may be sued on constructive process as to causes of action arising out of his securities business done in the State through an

agent. *Doherty & Co.* v. *Goodman,* 294 U. S. 623 (1935). And, as held in the *International Shoe Co.* case, a foreign corporation which has performed activities within a State through agents is amenable to suit on constructive service as to causes of action arising out of these activities.

In all these cases, the relations between the absent defendant and the State are such as to make it consistent with the due process clause of the Fourteenth Amendment to the Constitution of the United States that the defendant be required to answer on constructive service of process. The New York Court of Appeals failed to recognize that such a relationship exists here between the State of New York and the respondents.

The decedent, George L. Buckman, died a domiciliary of New York. That State, therefore, has power to regulate and tax the testamentary disposition of his property. *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562 (1942), and cases cited; *Cahen* v. *Brewster,* 203 U. S. 543 (1906). The respondents represent donees of *inter vivos* gifts which were made in contemplation of death, and which, therefore, were a substitute for testamentary disposition, and taxable as such. *Milliken* v. *United States,* 283 U. S. 15, 20-24 (1931); cf. *Graves* v. *Elliott,* 307 U. S. 383 (1939). By the same token, New York has the power to regulate the ultimate impact of death taxes paid by the estate, taxes which here were paid in part because of the *inter vivos* gifts. *Riggs* v. *Del Drago,* 317 U. S. 95 (1942). Thus, New York has the legislative power to create the substantive obligation asserted here by the petitioners against the respondents.

Moreover, there are practical reasons why the apportionment of estate taxes should be made in a single proceeding in the courts of the State administering the estate

of the decedent. The determination of the rights and liabilities of any one party interested in the estate cannot be made independently of the determination of the rights and liabilities of all other parties. Clearly, unless all interested parties can in fact be concluded by the determination of the Surrogate there is no way in which the Surrogate can give effect to his determination even with respect to the parties before him. Take, for example, the case at bar. One of the issues involved is whether, under New York law, the testator expressed an intention that the tax should be paid out of the residuary estate rather than be prorated. If the Surrogate should decide this issue in favor of the residuary legatees, but in a subsequent proceeding in New Jersey the issue should be decided against them as to these respondents, the Surrogate would have to modify his decree so as to impose a greater burden on the parties in fact before him than his decision would otherwise warrant. Close questions of law and fact frequently arise in making the proration contemplated by §124* and the possibilities of inconsistent determinations where they are litigated in several courts, in no one of which all parties are represented, is real and genuine. This, in practical result, would mean that the Court administering the estate would have to hold up administration until the executor had proceeded against all non-resident donees and then adapt his determination under §124 so as to take account of the different, and possibly varying, determinations of foreign courts, even though this might be at complete variance with the determination which §124 makes it the Surrogate's duty to render.

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* McKinney's Consolidated Laws of New York, Book 13 (1939), contains 5 pages, and its current pocket part, 20 pages, of annotations to §124 of the Decedent Estate Law, the apportionment statute.

These practical difficulties are avoided if the non-resident donees of gifts made by a New York decedent, who by virtue of that fact have sufficient contacts with New York to give it the legislative power to impose the liability in question, can be brought into the New York proceeding on constructive service. And it follows from the *International Shoe Co.* case and the other cases cited and discussed above at pages 8-9, that it is consistent with due process for such a proceeding to be initiated by constructive service.

Respondents may argue, as they did in the Court of Appeals, that the rule of these cases is inapplicable here, first, because these cases are based on the defendant's consent to constructive service or, second, because these cases involve causes of action arising out of activities of the defendant within the State. Neither distinction is tenable.

It is true that some cases, e.g., *Hess* v. *Pawloski, supra,* 274 U. S. 352, 356-357 (1927), have said that the absent defendant, by certain acts, indicated his consent to being sued on constructive service. But this Court has recognized that such "consent" is purely fictional. See the *International Shoe Co.* case, 326 U. S. at page 318; see also *Smolik* v. *Philadelphia & Reading Co.,* 222 Fed. 148, 151 (S. D. N. Y., 1915). And a comparable fictional consent could be here invented. The fictional consent actually means only that the defendant has such a relationship to the State as to make it permissible for the State to require him to respond in its courts, in other words, as though he had consented.

Nor can it be successfully argued that the rule of the *International Shoe Co.* case is limited to causes of action arising out of activities within the State. Thus, in *Milliken* v. *Meyer, supra,* 311 U. S. 457 (1940), the defendant's liability to constructive service arose not from the fact that the cause of action grew out of his activities in the State, but because he was domiciled in the State. Similarly, in *Williams* v. *North Carolina,* 317 U. S. 287 (1942), this Court held that a State may award a divorce decree to its domiciliary on constructive service, binding on an absent defendant, even though the defendant has never been in that State.

Thus, it is not merely activities within a State which permit constructive service of process, although that may often be the case. It is, as expressed by this Court, in the *International Shoe Co.* case, 326 U. S. at page 316, the defendant's "contacts" with the State which are important. We have already shown that the respondents' contacts with New York were sufficient to give New York the legislative power to create the obligation here asserted and, accordingly, that such contacts should also be sufficient to warrant the enforcement of such obligation by the courts of that State on constructive service of process.

This Court has never passed on the precise factual situation presented in this case. However, we submit that the rules just discussed show the error of the decision of the New York Court of Appeals. In the one aspect or the other, there is presented a federal question of substance, either not decided by this Court, or not decided in accordance with the decisions of this Court.

2. The question presented is of great importance in the administration of estate and tax laws, and is an important question of procedure.

We have already shown how important it is that the apportionment of estate taxes take place in one proceeding, and not be scattered into separate suits against non-resident donees. See pages 9-11, *supra*. The question presented, however, has added elements of importance.

This question of a State's power to require a non-resident donee to submit to an apportionment proceeding on constructive service may arise in States other than New York. At least twelve other States have adopted statutes for the apportionment of estate taxes, federal, state or both.* In addition, other jurisdictions provide for such

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* Arkansas: Act 99 of 1943.
California: Probate Code, §§970-977, as added by Stats. 1943, ch. 894.
Connecticut: Gen. Stats. (1945 Supp.), §§314 h-322 h, as added by L. 1945, ch. 228.
Delaware: Laws of 1947, H. B. 65.
Maryland: Ann. Code (Flack, 1939), Art. 81, §126, as added by L. 1937, ch. 546.
Massachusetts: Gen. Laws (Terc. Ed.) ch. 65A, §§5-5B, as added by St. 1943, ch. 519.
Minnesota: Stats. of 1941, §291.40, as added by L. 1931, ch. 332, §7.
New Hampshire: Rev. Laws, ch. 88A, as added by L. 1943, ch. 175, and as amended by L. 1947, ch. 102.
Pennsylvania: Purdon's Stats, tit. 20, §844, as added by L. 1937, P. L. 2762.
Rhode Island: Gen. Laws of 1938, ch. 43, §33, as added by L. 1936, ch. 2449, and as amended by L. 1939, ch. 664.
Tennessee: Code (Williams, 1946 Supp.), §§8350.7-8350.9, as added by L. 1943, ch. 109.
Virginia: Code of 1919, §5440(b), as added by L. 1946, ch. 128, and as amended by L. 1947, ch. 60.

One other state, Maine, enacted an apportionment statute, Rev. Stat. of 1944, ch. 142, §§39A-39E, as added by L. 1945, ch. 269, but repealed it by L. 1947, ch. 220.

apportionment without a specific statute.* And on an earlier occasion, this Court granted a petition for certiorari to review a decision of the New York Court of Appeals holding the apportionment statute of New York to be repugnant to federal law. *Riggs* v. *Del Drago,* 315 U. S. 795 (1942); 317 U. S. 95 (1942).

Further, the question may be of importance to the revenues of the States. For, if the non-resident donee of a gift made in contemplation of death cannot be served with constructive process in an apportionment proceeding, then he cannot be sued by the State in its own courts on constructive process in order to collect inheritance or estate taxes, even though the state has power to levy such taxes. *Curry* v. *McCanless,* 307 U. S. 357 (1939); *Graves* v. *Elliott,* 307 U. S. 383 (1939). The State might be without a remedy because unable to sue in the State of the donee's residence, since one State may refuse to enforce another State's revenue laws. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265 (1888); cf. *Milwaukee County* v. *White Co.,* 296 U. S. 268, 275 (1935). Considerations such as these led the New York State Tax Commission to file a brief *amicus curiae* in the New York Court of Appeals in support of petitioner's position.

Finally, the question presented here is an important one of procedure, involving a denial of state power, such as

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* *Trimble* v. *Hatcher's Ex'rs,* 295 Ky. 178, 173 S. W. (2d) 985 (1943), cert. den., 321 U. S. 747 (1944); *Martin* v. *Martin's Adm'r,* 283 Ky. 513, 142 S. W. (2d) 164 (1940); *In re Bernheimer's Estate,* 352 Mo. 91, 176 S. W. (2d) 15 (1943); *Commercial Trust Co.* v. *Thurber,* 136 N. J. Eq. 471, 42 A. (2d) 571 (Ct. Ch. 1945), aff'd on opinion below, 137 N. J. Eq. 457, 45 A. (2d) 672 (Ct. Err. & App. 1946).

led this Court to grant certiorari in *Milliken* v. *Meyer*, 310 U. S. 622 (1940); 311 U. S. 457 (1940).

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the decision of the Court of Appeals of New York should be granted.

CLARENCE B. CAMPBELL,
JOHN M. HARLAN,
PHILIP C. SCOTT,
Attorneys for Petitioners.

APPENDIX

Statutory Provisions

Pertinent statutory provisions are as follows:

DECEDENT ESTATE LAW OF NEW YORK

"§124. *Apportionment of federal and state estate taxes; executor or administrator to deduct taxes from distributive shares*

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law, or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, and except in a case where by written instrument executed inter vivos direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits

received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate; and except that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. For the purposes of this section the term 'persons interested in the estate' shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over

or distribute any fund or property with respect to which a federal or state estate tax is imposed until the amount of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated in so far as he is in possession of property or interests of such persons against whom such charge may be made and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty."

TAX LAW OF NEW YORK

"§249-m. *Definitions*

• • •

(g) The term 'persons interested in the estate' shall include all persons who may be entitled to receive or who have received any property or interest which is required to be included in the gross estate of a decedent, or any benefit whatsoever with respect to any such property or interest, whether under a will, or intestacy, or by reason of any of the transfers, trusts, estates, interests, rights, powers, and

relinquishment of powers as severally enumerated and described in section two hundred forty-nine-r of this article."

"§249-r. *Gross estate*

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):

* * *

3. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *."

SURROGATE'S COURT ACT OF NEW YORK

"§56. *Service personally without the state, or by publication.*

The surrogate from whose court a citation is issued or to be issued may make an order directing the service thereof personally without the state, or by publication, in either of the following cases:

1. Where it is to be served * * * upon a person who is not a resident of the state."

FILE COPY

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBERT S. MACCORMACK, JR., *pro se,*
273 New Jersey Avenue,
Union, N. J.,
As Executor and Trustee under the Will of Robert S. MacCormack, Deceased.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

The respondent, Robert S. MacCormack, Jr., as an executor and trustee under the will of Robert S. MacCormack, deceased, files this brief in opposition to the petition of the petitioners.

Reports and Opinions Below.

The Court of Appeals wrote no opinion, but its order is at R. 37, and is reported at 296 N. Y. 915, 73 N. E. (2d) 37.

The opinion of the Supreme Court, Appellate Division, appears at R. 30, 34, and is reported at 270 App. Div. 707, 62 N. Y. S. (2d) 337. The opinion of the Surrogate's Court appears at R. 25, and is reported at 183 Misc. 1, 50 N. Y. S. (2d) 201.

Statutes Involved.

The following statutes of New York are involved: Section 124 of the Decedent Estate Law, Section 249-m and 249-r of the Tax Law, and Section 56 of the Surrogate's Court Act.

Statement of Matter Involved.

The executor of the Estate of George L. Buckman instituted a proceeding in the Surrogate's Court of New York County for the judicial settlement of his account as executor.

Respondent is an executor and trustee of the Estate of Robert S. MacCormack, duly appointed by the Surrogate of Union County, and the estate he represents is not a benficiary of and has no claim against the Estate of George L. Buckman.

Respondent believes that the Surrogate's Court of New York County cannot compel respondent, a New Jersey Fiduciary, to submit to the jurisdiction of the Surrogate's Court of New York County in an action to settle the accounts of the executor of an Estate in which the estate respondent represents is not interested either as a beneficiary or claimant.

ARGUMENT.

The issue involved in this application for a writ of certiorari was not raised by petitioners and is academic since petitioners were not aggrieved by the determination below.

This proceeding originated in the Surrogate's Court of New York County, New York. The purpose of the proceeding was to settle the account of an executor.

Petitioners filed objections to that account in which they demanded that the executor collect from the donees of certain *inter vivos* gifts (admittedly made in contemplation of death) such portion of the estate tax as was predicated on those gifts or pay it himself (Record, p. 12, fol. 19).

Thus, the issue raised by petitioners' objections was an issue between them and the executor and was not an issue between these petitioners and these respondents, and that issue was clearly within the jurisdiction of a New York State Surrogate.

At that point, however, the Surrogate, to whom that issue was presented, of his own volition, intervened and directed the executor to file a supplemental petition and to secure and serve a supplemental citation requiring all living recipients of those *inter vivos* gifts and the personal representatives of all deceased recipients of such gifts, regardless of their domiciles, to appear in the Surrogate's Court in New York for a "final determination" of the rights of the parties with respect to the allocation of the estate tax (Record, pp. 13 and 14, fol. 20).

The executor followed the directions of the Surrogate but under protest. He protested that non-resident recipients of gifts who were not beneficiaries under the will or claim-

ants to a part of the estate could not be brought into a Surrogate's Court of New York by a citation served outside the State of New York (Record, p. 14, fol. 21).

These respondents and their testators are non-residents, being domiciled in New Jersey; they are not beneficiaries under the will and they do not claim any part of the estate (Record, pp. 14 and 15, fol. 22). Nevertheless, such supplemental citation was served on them outside the State of New York (Record, p. 3, fol. 5).

These respondents appeared specially and moved to set such service aside (Record, p. 3, fol. 5). The Surrogate denied the motion; the Appellate Division of the First Department reversed and set the service aside and the Court of Appeals affirmed the Appellate Division (Record, p. 37, fols. 60 and 61).

Thus, these petitioners, the executor and the donees of the *inter vivos* gifts, including these respondents, are just where they were before the Surrogate intervened and directed the issuance and service of the supplemental citation. No one of them is the loser or is in any way aggrieved. The issue raised by the objections of these petitioners may still be tried in the Surrogate's Court in New York.

The basic issue before the Surrogate was the procedure to be followed by the executor in order to collect from non-resident donees of *inter vivos* gifts who had no interest in the estate as beneficiaries or claimants that portion of the Federal and State Estate Tax which the Surrogate might find should be apportioned against their *inter vivos* gift. The Court of Appeals merely held the Surrogate could not obtain jurisdiction over these respondents by service of citation by publication in an accounting proceeding. There was no final determination of the rights of the parties.

If the Surrogate so directs, the executor can pursue the gift beneficiaries by the use of due legal process and may endeavor to collect their respective shares of the estate tax. If the executor fails, through negligence or connivance, to make such collection, the Surrogate can surcharge him.

Therefore, the issue which this Court is being asked to take under consideration is extraneous and academic.

Conclusion.

For the foregoing reasons respondent believes that the Petition for Writ of Certiorari should be denied.

Dated: July 29, 1947.

Respectfully submitted,

ROBERT S. MACCORMACK, JR., *pro se*,
As executor and trustee under the Will
of Robert S. MacCormack, deceased.

Supreme Court of the United States

October Term, 1947

No. 158

ISABEL KAY, BERTHA BUTMAN and BERTHA BUTMAN, as Executrix under the Will of JULIA KAY,

Petitioners,

v.

EMILY W. MACCORMACK, EDITH M. MACCORMACK, and ROBERT S. MACCORMACK, JR., as Executors and Trustees under the Will of ROBERT S. MACCORMACK, deceased, and MARIE HEGEMAN WARNOCK, individually and as surviving executrix of the Estate of HENRY B. HEGEMAN, deceased, and MAX R. HOENER, substitute-successor executor under the Will of GEORGE L. BUCKMAN,

Respondents.

REPLY BRIEF OF PETITIONERS

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Respondents.

REPLY BRIEF OF PETITIONERS

The petitioners file this brief in reply to the brief in opposition of Robert S. MacCormack, Jr. as Executor and Trustee under the Will of Robert S. MacCormack, deceased.

Respondent, while making no attempt to answer the petition herein on the merits, for the first time in this litigation contends that these petitioners were not aggrieved by the determination of the court below and hence that they have no interest in the question presented by the petition for certiorari.

The contention that the petitioners were not aggrieved by the determination below is apparently based upon two distinct grounds: (1) that the supplemental petition of the Executor which initiated the proceeding for allocation of estate taxes to which the respondents were sought to be made parties by supplemental citation was filed pursuant to the direction of the Surrogate rather than upon the motion of either the Executor or these petitioners and that therefore these petitioners are in no position to complain; and (2) that the respondents can still be sued by the Executor in the courts of another state, if the Surrogate so directs, and that therefore the petitioners were not aggrieved by the determination that the Surrogate did not have jurisdiction to determine the liability, if any, of the respondents in this proceeding.

I

As to the first ground, the respondent's contention turns solely upon the fact that the proceeding for allocation of estate taxes under Section 124 of the New York Decedent Estate Law was initiated by the Executor at the direction of the Surrogate rather than voluntarily and of his own motion. No contention is made and certainly none could soundly be made that these petitioners would not have been necessary and proper parties if the Executor himself had initiated the petition for allocation of estate taxes in connection with the original petition for accounting. In such a proceedng the interests of these petitioners and respondents would clearly have been adverse and there is no question that the petitioners would have had the right to appeal from a decision in favor of the respondents. The fact that the proceeding was commenced by the Executor at the direc-

tion of the Surrogate in no way affects the nature of the proceeding nor the interests of the parties thereto. These petitioners are as much aggrieved by a determination that the Surrogate did not have jurisdiction over these respondents in a proceeding initiated at the direction of the Surrogate as they would have been aggrieved in the identical proceeding had it been initiated by the Executor himself.

In this connection it is of interest that respondent recognized that petitioners were interested parties when he and the other respondents appealed to the Appellate Division from the order of the Surrogate here in question since the notice of appeal was directed not only to the Executor but also to the present petitioners. Indeed, throughout this litigation there has never been any suggestion up to this point that the petitioners had no interest in the question raised by this petition.

II

The second ground for the contention that the petitioners were not aggrieved by the determination of the court below, namely, that despite the determination of the court below that the Surrogate did not have jurisdiction over the person of the respondents the respondents can subsequently be sued in the courts of another state, is also obviously unsound. If this ground were correct, it would follow that a party is never aggrieved by a determination that a court does not have jurisdiction over the person of an adverse party since it is always true that such a determination is no bar to instituting a suit in some other court.

It is submitted that the objection of the respondent MacCormack, raised now for the first time in this litigation, that these petitioners were not aggrieved by the determination of the court below is totally without merit.

Respectfully submitted,

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